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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-381

BASYAP, INC., *ET AL.*,
Petitioners,

v.

GEORGE ROMNEY, SECRETARY, H.U.D., *ET AL.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NICHOLAS A ADDAMS
1707 -N- Street, N.W.
Washington, D.C. 20036

Attorney for Petitioners

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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1. The Court of Appeals improperly upheld the taking of Petitioners' real property and business – Petitioners being individual property owners and/or small businessmen – for an urban renewal project in violation of their constitutional right to due process of law under the Fifth Amendment prior to deprivation of their property through condemnation, contrary to *Berman v. Parker*, 348 U.S. 26 (1954), by sustaining the Secretary of the U.S. Department of Housing and Urban Development's refusal to afford Petitioners an opportunity to challenge the findings underlying his decision to acquire Petitioners' properties	8
2. The Court of Appeals' decision is in direct conflict with a Third Circuit decision, *Shannon v. United States*, 436 F.2d 809 (1970), both bearing on the administration of Federal Urban Renewal projects in the same administrative geographical district, in that *Shannon* requires the Secretary of HUD to afford those adversely affected a due process institutionalized method of submitting data to him before project approval in conflict with the Court of Appeals herein which does not	13

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3. The Court of Appeals' judgment opens the way for the Secretary of HUD to rubber stamp the local planning agency's designation of an area for acquisition and urban renewal, which said designation merely affixes a slum and blight label to said area 14

4. The Court of Appeals' judgment allows the local planning agency to nullify statutorily required citizen participation on a record comprised solely of a list of meetings without any record of what transpired at said meetings called by those having interests clearly adverse to Petitioners' 15

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IN THE

Supreme Court of the United States

October Term, 1972

No.

BASYAP, INC.,
GEORGE KARAFAS,
AMALYA REIFSNEIDER,

Petitioners,

v.

GEORGE ROMNEY, SECRETARY, H.U.D.,
DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY,
NATIONAL CAPITOL PLANNING COMMISSION,
DISTRICT OF COLUMBIA CITY COUNCIL,
DISTRICT OF COLUMBIA GOVERNMENT,

Respondents.

PETITION
FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the District of Columbia Circuit

BSAYAP, Inc., George Karafas, and Amalya Reifsneider pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on June 7, 1972.

Opinions Below

The opinion and order of the United States District Court for the District of Columbia has not been reported. This opinion is printed in its entirety in the Appendix hereto, pages A-4 to A-16.

The United States Court of Appeals, in division, affirmed the judgment of the United States District Court for the District of Columbia without a written opinion on April 28, 1972. The order of the division is set forth in the Appendix hereto at page A-3.

The United States Court of Appeals, *en banc,* denied the motion for a rehearing *en banc* on June 7, 1972. A copy of its order denying the motion for rehearing *en banc* is set forth in the Appendix at page A-1, 2.

Jurisdiction

The motion for a rehearing was denied June 7, 1972. The jurisdiction of this Court is invoked under 28 USC 1254(1).

Questions Presented For Review

Whether a contract by the Secretary of the Department of Housing and Urban Development to fund an urban renewal project in a purely commercial district is authorized by statute (42 USC 1450, *et seq.*,) in the absence of a prior determination by the Secretary that the objectives of the urban renewal program can not be achieved by rehabilitation of the project area?

Whether the Secretary of Housing and Urban Development is authorized to fund an urban renewal project in a

purely commercial area – which project will take the commercial property of Petitioners who are individual property owners and/or small businessmen and turn said property over to a select few private interests for large-scale commercial development – where the Secretary refused to afford Petitioners an opportunity and method to challenge the findings underlying his decision to acquire Petitioners' properties through condemnation in violation of their constitutional right not to be deprived of their property without due process of law under the Fifth Amendment and contrary to *Berman v. Parker*, 348 U.S. 26 (1954), and where he refused to allow affected persons to submit evidence challenging the factual basis of his determinations that the projected area is a slum and blighted area, and the factual basis of his finding that the purposes of the urban renewal program can not be achieved through rehabilitation of the area?

Whether this Court must resolve the direct conflict between the Court of Appeals herein and that of the Third Circuit in *Shannon v. United States*, 436 F.2d 809 (1970), both bearing on the administration of Federal Urban Renewal projects in the same administrative geographical district, in that *Shannon* requires the Secretary to afford those adversely affected an institutionalized due process method of submitting rebuttal data to him prior to project approval, whereas the Court of Appeals herein denied Petitioners such a due process method of submitting rebuttal data.

Constitutional and Statutory Provisions Involved

Fifth Amendment, Constitution of the United States:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

Federal Housing and Development Act of 1949; 42 USC 1450 *et seq.*:

42 USC 1451(e) –

> No loan or grant contract may be entered into by the Secretary for an urban renewal project unless he determines that (1) the workable program for community improvement presented by the locality pursuant to subsection (c) of this section is of sufficient scope and content to furnish a basis for evaluation of the need for the urban renewal project; and (2) such project is in accord with the program. (As amended August 10, 1965, Pub. L. 89-117, title I, §101(f), title III, §§302(a)(1), (b), 305(b), 79 Stat. 453, 474, 476; Sept. 9, 1965, Pub. L. 89-174, §7(d), 79 Stat. 670; May 25, 1967, Pub. L. 90-19, §6(b), (c).

42 USC 1460(c)(10)(A)

> Notwithstanding any other provision of this sub-chapter, (A) no contract shall be entered into for any loan or capital grant under this subchapter for any project which provides for demolition and removal of buildings and improvements unless the Secretary determines that the objectives of the urban renewal plan could not be achieved through rehabilitation of the project area, and (B) not less than 10 per centum of the aggregate amount of (i) grants authorized to be contracted for under this subchapter by the Housing and Urban Development Act of 1965 and subsequent Acts, and (ii) loans authorized to be made under section 1452b of this title, shall be available for projects assisted

with such grants or loans which involve primarily code enforcement and rehabilitation. (As amended May 25, 1967, Pub. L. 90-19, §6(b), (f), 81 Stat. 21, 22; Aug. 1, 1968, Pub. L. 90-448, title V, §505, 82 Stat. 522.)

Statement of the Case

This is an action to enjoin the acquisition of commercial and business properties in the downtown area of the City of Washington, D.C., for the purpose of an urban development project which proposes to raze the existing structures, and, thereafter to build other structures in the area.

Petitioner, BSAYAP, Inc., is a non-profit association of small businessmen and property owners in the affected area whose property rights, including that of operating their existing businesses will be destroyed should the project be carried forward. The petitioners, George Karafas and Amalya Reifsneider, are individual businessmen affected adversely by the proposed urban renewal project. Petitioners assert that their individual properties and/or businesses will be acquired and turned over to a very select few private developers for large-scale commercial buildings.

Petitioners complained that the Federal and District Respondents failed to perform certain mandatory procedures under the Federal Housing Act of 1949, 42 USC 1450 *et seq.*,[1] before approval of said project, and that said

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[1] The project was approved without advance notice to Petitioners, on April 2, 1970.

mandatory procedures were not performed before Respondent Secretary of HUD authorized and guaranteed funding for Respondent DCRLA to acquire Petitioners' properties and businesses under said project, officially titled "the Downtown Part of the Second Year Action Plan of the District of Columbia Neighborhood Development Program (hereinafter Urban Renewal Plan or Plan).

Notwithstanding failure to comply with the Act, Secretary George Romney, signed a contract to fund said plan on November 18, 1970. However, the non-rehabilitation certificate required by the statute (commonly called the "307" finding) had not been signed on that date, and in fact, was not signed until December 18, 1970, one month after the approval of the funding contract, an act to which it was a statutory prerequisite.

The determination that the area was "slum and blighted" was not made by the Secretary at all. On the contrary, it was the product of the Respondent District of Columbia Redevelopment Land Agency (DCRLA)[2] which in the course of depositions admitted that the survey on which this determination was based contained errors.[3]

The business owners and property owners affected by the proposed plan were afforded no effective opportunity

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[2] This agency has demonstrated its lack of expertise, "and the general presumption that the agency has correctly discerned and implemented the intent of the legislature would seem singularly inappropriate." *Cy Ellis Raw Bar v. DCRLA*, 139 U.S. App. D.C. 385, 390, 433 F.2d 543 (1970).

[3] Record, Deposition of H.G. Dean, project director for Respondent NCPC, District Court C.A. 1648-70, p. 62 taken June 16, 1971.

to participate in the process which led to the decision to fund the urban renewal project. The project appears to have had its formal initiation some time in December 1969, and no public meetings on it were held by governmental agencies. On the contrary, a series of meetings *by invitation* were held by Downtown Progress, a group of private big-business citizens interested in promoting the urban renewal project.[4]

The invitations issued by Downtown Progress –

(1) failed to advise the affected business and property owners that they would have clear and direct access to the decision-making in the urban renewal program;

(2) failed to advise them as to which properties would be taken under the project.

On August 10, 1970, Petitioners requested access to the survey upon which the non-rehabilitation certificate was allegedly based[5] in order to prepare rebuttal testimony on this issue.[6]

On August 10, 1970, and September 18, 1970, Petitioners formally requested a hearing before the Secretary for the purpose of submitting rebuttal data designed to refute

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[4] Record, Petitioner-Appellants' motion for Summary Judgment, Statement of Facts, Exhibit 4, Appellants' Appendix, Court of Appeals 71-1792.

[5] Record, Appendix A to Petition For Rehearing or *En Banc* Hearing, Court of Appeals 71-1792.

[6] Petitioners subsequently secured a survey of the area by a leading architect, Arthur Cotton Moore and his staff. This survey showed that the buildings could be rehabilitated at less cost than the cost of the urban renewal plan. See Appellants' Appendix, pp. 104-117.

the conclusions of the District of Columbia Redevelopment Land Agency that their buildings were sub-standard and had a blighting influence on the area.[7] This request was denied by the Secretary on the ground that no statute required a hearing.[8]

Cross-motions for summary judgment were filed, the extensive respective statements of facts contravening each other almost entirely. The district court resolved all of the fact questions in Respondents' favor, granting summary judgment for Respondents and against Petitioners. (A. 4). The Court of Appeals affirmed this ruling without opinion. (A. 1, 2, 3).

REASONS FOR GRANTING THE WRIT

FIRST

This case involves a purely commercial area. The area is presently comprised of 3 and 4 story buildings, most of which are owned by individuals and in which the owners of the property and/or their tenants operate classically thought of small businesses. The urban renewal plan herein will take the property and businesses away from these individual owners and small businessmen and turn the property over to a very select-few large-scale developers to clear the land and erect very large office buildings. The small businessmen are being forced out of their business locations of many years and will be compelled to attempt to pick up the pieces elsewhere. The results of the southwest

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[7] *Op. cit.*, fn. 5.

[8] *Op. cit.*, fn. 5, Exhibit B.

Washington, D.C. urban renewal project sustained in *Berman v. Parker*, 348 U.S. 26 (1954) teach that most small businesses displaced under urban renewal (removal) projects die and never reopen.

To counsel's knowledge, this is the first time where this course of action (taking from one set of commercial property owners and turning it over to other private interests for commercial development) has ever been attempted under the guise of an urban renewal program and for this reason it has nation-wide implications. If urban renewal programs are allowed to proliferate along the course that the one herein has, such programs will toll the death-knell forever of small businesses throughout the United States in large urban centers.

Important issues are involved in the construction of the Housing Act of 1949, as amended. Those issues are whether the Act which has the purpose of rehabilitating slum and blighted *residential* areas can be applied in a purely commercial area; whether the Secretary is required to make a good-faith determination that the purposes of urban renewal cannot be served by rehabilitation rather than by removal; whether he must make that determination *before* he agrees to fund a local urban renewal project; and whether he must provide for the submission of rebuttal data by those affected by the proposed project and, in good faith, consider such rebuttal data. The importance of these questions lies in the fact, that unless the Secretary is required to comply with the restrictions which Congress has placed upon his actions, property rights of many citizens will be made subject to a determination by a government official, and their property rights may be lost, even though those citizens have not been informed of what the agency proposes to do, and may be able to

supply conclusive evidence that no public purpose is in fact served by the destruction of their property and their rights. If the statute were to be so construed, it would of course, violate the due process clause of the Fifth Amendment to the Constitution.

Berman v. Parker, 348 U.S. 26 (1954) sustained the urban renewal process in the District of Columbia in general; and specifically held that an area could be designated for urban renewal even though some structures were sound.[9] Implicit in *Berman* is that an area comprised mostly of structurally sound buildings cannot be condemned, and that there is some percentage of sound buildings to all buildings which would not warrant urban renewal. Further implicit in *Berman* is that the affected persons do not have to blindly accept the findings of government experts as to the soundness of their buildings, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, (1971), and should have a due process opportunity to show that the designated area is comprised of enough sound buildings to make the area ineligible for an urban renewal project.

In the light of the statutory purpose, rehabilitating slum and blighted *residential* areas, the fundamental issue is whether the area is in fact a slum or blighted one. If it can be rehabilitated, there is no reason for the destructio. of small business which necessarily results from this urban renewal project.

In order to determine this question, HUD requires a finding (a) that more than 50 per cent of the buildings

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[9] In *Berman*, DCRLA's surveys revealed 64.3% of the dwellings were beyond repair and 18.4% needed major repair, 348 U.S. 26, 30.

be structurally substandard, as determined by specified criteria, or (b) that more than 20 percent of the buildings be structurally substandard and an additional clearance in an amount to bring the total to more than 50 per cent must represent specified blighting influences. HUD Handbook on Urban Renewal.[10]

But, of course, buildings are not structurally substandard merely because a government official, local or federal, chooses to say that they are. The owner of a building, or its occupant, may very well take a different view of that question.

The area included herein contains 74 buildings, all used for business purposes. This means that under the HUD criteria at least 38 of them would have to be sub-standard or have blighting influences. DCRLA's funding application of June 29, 1970 baldly asserted that 35 of these buildings were rated structurally substandard, and 10 additional buildings had blighting influences. HUD itself made no examination of the buildings, except that one of its employees walked through the area and looked at the outside of the buildings. However, it was conceded that mistakes had been made in the survey.[11] Petitioners, on the other hand, attempted to present evidence by architect Arthur Cotton Moore that the buildings in the area were structurally sound. This evidence was not considered by the Secretary, who also refused Petitioners access to DCRLA's assertions, so that they could determine for themselves the correctness of the results prepared by this local agency. His reasons for this refusal were that the request for information was not

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[10] *Op. cit.*, fn. 5, Exh. C, pages 4 and 5 of Handbook.

[11] *Op. cit.*, fn. 3

specific enough, and that the statute made no provision for a hearing.[12]

Thus, the basic factual determination was made by the Secretary on the basis of a one-sided record which the Petitioners were denied an opportunity to rebut. If the statute is so to be interpreted, grave doubts as to its constitutionality arise.

The Secretary's refusal, and the judgment of the Court of Appeals, is not in accord with previous decisions of this Court which hold that before the government takes an action which seriously injures an individual, and the reasonableness of the action depends upon a fact finding, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. See, *e.g.*, *Greene v. McElroy*, 360 U.S. 474; *Thorpe v. Housing Authority*, 393 U.S. 268; *Goldberg v. Kelly*, 397 U.S. 254.

In *Greene v. McElroy*, 360 U.S. 474, 496 (1959), this Court said:

> . . . Certain principles have remained relatively immutable to our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

This aspect of due process by a government agency stems from the Fifth Amendment of the Constitution and does

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[12] *Op. cit.*, fn. 8.

not depend on any statutory procedure. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1969).

In *Greene v. McElroy, supra*, no statute required the Defense Department to give a hearing to an employee being dismissed. It was held that the employee had a right to be informed of the times and places he allegedly attended Communist meetings, so he could review the events and present evidence disproving the allegations. In *Thorpe v. Housing Authority*, 393 U.S. 268, 281, 282 (1969), a tenant had been ordered to leave public housing on grounds of disorderly conduct. Held – that he was entitled to know the times and places of alleged offenses in order to challenge the allegations. And in *Goldberg v. Kelly*, 397 U.S. 254, 266, 267 (1969), a welfare recipient was entitled to a hearing on the allegations before benefits were cut off.

SECOND

The Court of Appeals for the Third Circuit, in *Shannon v. United States*, 436 F.2d 809 (1970) held that the Secretary of HUD must offer persons adversely affected by an urban renewal project the opportunity to submit rebuttal data before approval for funding:

> We hold, however, that the agency [HUD] must utilize some institutionalized method, whereby in considering site selection and type-selection, it has before it the relevant racial and socio-economic data necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts. 436 F.2d at 821.

As detailed in the FIRST reason, the Secretary did not use any institutionalized method, much less a hearing, where Petitioners – who are adversely affected by the urban renewal project herein – could submit data to him. The Court of Appeals' judgment herein, *sub silento*, holds that the Secretary may approve an urban renewal project while denying persons adversely affected the opportunity to submit data to him on the merits of the program prior to funding it.

Thus the judgment herein, if let stand, presents a square conflict between Circuits in the application of constitutional due process requirements to federal urban renewal programs. Worse yet, the two Courts of Appeals present a conflict in the administration of the Housing Act within the same geographical area; to wit, HUD Region II, the Administrator of which must grant hearings in Philadelphia but can deny them in Washington.

THIRD

The Secretary herein relied *carte blanche* on the slum and blight findings of the local planning agency (DCRLA) to support his "307 determination" without making any independent findings, contrary to *Citizens to Preserve Overton Park v. Volpe*, 301 U.S. 402 (1971) and *D.C. Federation of Civic Associations v. Volpe*, (D.C. Circuit No. 24,838) ___ U.S. App. D.C. ___, ___ F.2d ___, (not reported as yet), commonly called the "Three Sisters Bridge Case". Three Sisters held that *Secretary* Volpe through his designated delegate *can not "rubber stamp"* the local planning agency's findings (therein, Transportation Planning Board of the Metropolitan Council of Governments):

> The statute plainly does not permit the Department to delegate its statutory responsibility to a local planning agency (___ F.2d at ___, Slip. Op. p. 13).

Likewise, herein, the Secretary of HUD cannot delegate his responsibility to determine if an area is slum and blighted to the local planning agency, DCRLA, but has a duty to make such determination independently, himself or by a delegate from his office. He cannot rely on the one-sided determination made by DCRLA which has a vested interest in seeing the project go forward

FOURTH

42 US 1451(e) provides that the Secretary cannot fund an urban renewal project unless the "project is in accord with the local Workable Program".

The HUD Handbook, Workable Program for District of Columbia, July 1, 1969 to June 30, 1971, states:

> The Workable Program requires clear evidence that the community provides and continues to expand, opportunities for citizens, especially those who are poor and members of minority groups to participate in all phases of the HUD-assisted renewal and housing programs. The particular organizational means for community involvement is left to the discretion of each community, but the community must demonstrate in its Workable Program submission that it provides clear and direct access to decision making, relevant and timely information,

> and necessary technical assistance to participating groups and individuals in programs covered.[13]

There is nothing in the record to show that the public, at least those members of the public who are the small businessmen most adversely affected by the proposed project ever had a real or clear or direct access to the decision making process. On the contrary, DCRLA's funding application was completely barren of any evidence of citizen participation for the downtown area herein. The record before the district court reveals absolutely no record of what transpired at the few informational meetings held prior to announcement of the plan – no transcripts, no abstracts, no speakers' notes, nothing insofar as the small businessmen-Petitioners are concerned. Only Downtown Progress, a coalition of large business interests, hostile to the interests of the small businessmen, played any part in the decision making process. There was no provision for the effective presentation of the views of the small businessmen, and when they requested such an opportunity, the Secretary denied it on the ground that the statute contained no provision for a hearing.

When the Secretary approved the submission in the teeth of a record which demonstrated that the submission was not in accordance with the Workable Program – because an important segment of the persons affected by the proposal had had no real opportunity to present their views – he exceeded his statutory authority, and his action is invalid.

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[13] Exhibit E, Amended Complaint, Dt. Ct. No. 1648-70; See also Appendix in Ct. App. No. 71-1001, Exhibit IX, p. 21.

Despite this clear showing that the statute had not been complied with, the Court of Appeals, by its silence, approved this abuse of statutory authority. Its decision was in square conflict with that of the Court of Appeals for the Third Circuit in *Shannon, supra,* where that Court held that the Secretary was obliged to provide an institutionalized method for the presentation of opposing views and submission of data.

The decision of the Court below in this case was error, and it is important that certiorari should be granted in this case to correct that error. Uncorrected, the judgment of the Court below places any property owner at the mercy of governmental officials, and does not even afford them an opportunity for effective protest. The judgment as it stands could turn Washington back to the days of arbitrary administrative oppression.

FIFTH

One of the principal determinations which the Secretary was required to make, the "307 determination,"[14] in order to fund the proposed plan was whether the purposes of urban renewal could be accomplished by rehabilitation of the substandard buildings. The statute 42 USC 1460(c) 10(A) provides:

> no contract shall be entered into for any loan or capital grant under this subchapter for any project which provides for demolition

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[14] The purpose of Section 307, – to avoid the costly and drastic clearance procedures except in clear cases – is stated in H. Rept. No. 1703 (88th Cong., 2d Sess. 1964), U.S. Cong. Std. News pg. 3430.

> and removal of buildings and improvements unless the Secretary determines that the objectives of the urban renewal plan could not be achieved through rehabilitation of the project area . . .

There is no dispute that, at the time the funding contract was signed on November 18, 1970,[15] the Secretary had not made a determination that the project area could not be rehabilitated, since the "307" finding was not signed until December 18, 1970.[16]

The clear language of the statute requires that the determination of non-rehabilitation *precede* any contract to fund the project. Unless the Secretary is not required to comply with the mandatory requirement of the statute, this disregard of the statutory requirements invalidates the Secretary's action.

The issue is not just a technical one. The Petitioners attempted to present to the Secretary a comprehensive plan prepared by Arthur Cotton Moore, a qualified and distinguished architect and planner, which demonstrated that, not only could the project area be rehabilitated, but that it could be rehabilitated within the objectives of the plan at much less cost than that of the urban renewal plan herein calling for demolition and removal of the existing buildings.[17] (Mr. Moore's alternative plan).

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15 Appellants' Appendix below, Statement of Facts, paragraph 1, p. 37.

16 *Ibid.*, paragraph 2, p. 37.

17 Petitioners-Appellants' Appendix, pp. 115, 116.

This evidence was never considered by the Secretary. The rejection of the Moore plan resulted from the assertion of some members of the City Council of the District of Columbia that it was in conflict with the plan they had approved.[18] Thus, the ultimate determination of this crucial issue was made, not by the Secretary, but by the local authorities. The statute plainly does not permit the Department to delegate its statutory responsibility to a local agency. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 416; D.C. *Federation of Civic Associations v. Volpe* (October 12, 1971, Court of Appeals for the District of Columbia, Case No. 24,838).

The violation of the statute by the Secretary is plain. By its silence the Court below approved that violation, and its decision was erroneous with respect to an important question of statutory construction.

WHEREFORE, Petitioner prays that a writ of certiorari issue to review the judgment of the Court below.

NICHOLAS A ADDAMS
1707 N. Street, N.W.
Washington, D.C. 20036

Attorney for Petitioners

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[18] *Ibid.*, fn. 17, p. 103, 104.

APPENDIX

[Filed June 7, 1972]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1792

September Term, 1971
Civil Action 1648-70

Businessmen Affected By The Second Year Action Plan (Basyap),
Appellant

v.

District of Columbia Redevelopment Land Agency, *et al*

Before: Bazelon, Chief Judge; Wright and Tamm, Circuit Judges.

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ Nathan J. Paulson
NATHAN J. PAULSON
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D.C. 20001

* * *

June 7, 1972

* * * * *

Nicholas A. Addams, Esq.
1707 N Street, N.W.
Washington, D.C. 20036

Dear Mr. Addams:

Enclosed is a copy of the Court's order denying your petition for rehearing.

You are further informed that your suggestion for rehearing *en banc* was transmitted to the full Court, and no Judge has requested a vote thereon. Your attention is called to Rule 35(a) of the Federal Rules of Appellate Procedure which provides in pertinent part as follows:

> "Such a hearing is not favored and ordinarily will not be ordered except (1) when consideration by the full Court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."

In view of the foregoing, it is not anticipated that any further action will be taken with respect to the suggestion for rehearing *en banc*.

Yours very truly,

/s/ Nathan J. Paulson
NATHAN J. PAULSON
Clerk

NJP/bjg
cc: Richard W. Barton, Esq.
Edmund B. Clark, Esq.
Antohony A. Lapham, Esq.
Enc.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1792

September Term, 1971
Civil Action 1648-70

Businessmen Affected By The Second Year Action Plan (Basyap),
Appellant

v.

District of Columbia Redevelopment Land Agency, *et al*

[Filed April 28, 1972]

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

There has been essential compliance with this court's order to the District Court to hold a full hearing with adequate discovery. *See Businessmen Affected by the Second Year Action Plan v. D.C. Redevelopment Land Agency*, 143 U.S. App. D.C. 161, 442 F.2d 883 (1971). The record reveals no error affecting substantial rights.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam.

/s/ DB
JSW
EAT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BASYAP, INC., *et al* *Plaintiffs*	)	
v.	)	Civil Action No. 1648-70
D. C. REDEVELOPMENT LAND AGENCY, *et al* *Defendants*	)	

[Filed July 30, 1971]

MEMORANDUM OPINION AND ORDER

Plaintiffs bring this action to enjoin the further implementation of modifications to the downtown Washington, D.C. Urban Renewal Plan by defendants, based on alleged procedural and substantive violations of statutory schemes enacted by Congress for such programs. On July 9, 1971 this matter came before the Court on cross-motions for summary judgment.

Plaintiff, BASYAP, INC., is a non-profit corporation whose members are property owners, business operators and/or tenants of properties located within the Downtown Urban Renewal Area which are to be acquired by defendant DC RLA (RLA) in connection with the Second Year Action Plan of the District of Columbia Neighborhood Development Program (NDP).

Defendant National Capital Downtown Committee, Inc., (Downtown Progress) is a non-profit corporation organized by local businessmen in 1960 to promote urban improvement in downtown Washington, D.C.

Defendant District of Columbia Redevelopment Land Agency (RLA) is a federal agency established under the District of Columbia Redevelopment Land Act of 1945. It is empowered to acquire real property for the development of project areas in the District of Columbia and to accept financial assistance under Title I of the Federal Housing Act of 1949, as amended.

Defendant National Capital Planning Commission (NCPC) is an independent federal agency created under 40 U.S.C. §71 (a) to prepare, adopt and amend comprehensive plans for the national capital and serve as the central planning agency for the federal and District of Columbia governments in the national capital region. It has the responsibility of adoption of boundaries of redevelopment project areas and of redevelopment plans for the project areas.

Action by NCPC is a requisite for exercise by RLA of its authority to acquire and dispose of real property for the redevelopment of the project area.

Defendant District of Columbia City Council is the local governing body of the District of Columbia, and its approval is required for all applications by RLA for federal financial assistance. Approval by the City Council of boundaries of redevelopment project areas proposed by NCPC and, after public hearing, of the redevelopment plan for the project area is a requisite for exercise by RLA of its power to acquire and dispose of affected real property.

Defendant Romney is Secretary of the Department of Housing and Urban Development (HUD) which renders financial assistance to local public agencies for redevelopment projects. Before any locality may apply to HUD for funds for an urban renewal project, it must first comply with certain of the provisions of the Federal Housing Act of 1949 and the Housing and Urban Development Act of 1968. 42 USC §§1450-1469.

Plaintiffs contend that the defendants violated requirements of statutes and the Workable Program, both procedurally and substantively, in the planning, adoption, approval and implementation of modifications to the Urban Renewal Plan for the Downtown Urban Renewal Area, that is, the Second Year Action Plan. The requirements allegedly violated are contained in 42 USC §§ 1450-1469 and 5 D.C. Code §705 and in the Workable Program, and in essence are founded upon:

> 1. The defendants' failure to afford adequate opportunity for effective participation by persons likely to be affected.

2. The defendants' failure to provide an adequate site and use plan which contained controls for the disposition of the properties to be acquired by RLA.

3. The defendants' failure to make the required slum and blight determination for the affected areas.

4. The defendants' failure to make the required determination that the objectives to be achieved by acquisition could not have been achieved by rehabilitation, and the failure to determine that such acquisition was in accord with the Workable Program and the Urban Renewal Plan.

5. Defendant Romney's acceptance of a series of City Council determinations regarding the above mentioned findings, which were contrary to fact and his failure to grant a hearing to BASYAP prior to his decision approving financial assistance for the Second Action Year Plan.

Plaintiffs also contend that some relationship akin to a conflict-of-interest exists between officials of HUD, RLA and Downtown Progress, due to prior employment relationships. However, plaintiffs have made no showing of facts from which it could be inferred that those officials acted improperly in carrying out their responsibilities in connection with the Second Action Year Plan.

In 1962, Downtown Progress proposed an action plan for downtown renewal and revitalization. During the period 1967 through 1969 it conducted a feasibility study under

an RLA contract financed by HUD. The result was the Downtown Urban Renewal Plan approved by NCPC on January 9, 1969. On January 28, 1969 the City Council voted to approve that general downtown plan which covers approximately 616 acres lying between North Capital Street and 15th Street, N.W. and Pennsylvania Avenue and M Streets, N.W. Twenty-four squares of that area are designated as the retail core, part or all of four of which are now to be acquired under the plan and form the basis for this suit.

Before any locality may apply to HUD for urban renewal project funds it must first have submitted a Workable Program to that agency. 42 USC §1451(c). On June 17, 1969 the City Council met this requirement by recertifying its Workable Program by Resolution No. 69-52.

The urban renewal activities in the downtown plan are being financed by HUD under the Neighborhood Development Program (NDP), a new form of loan and grant financing established by the Housing and Urban Development Act of 1968. The NDP provides annual allotments of funds to meet the costs of renewal activities for each year (an Action Year) instead of the procedure in the original urban program of reserving funds years in advance of need.

The Washington, D.C. NDP presently includes four Project Areas under a single funding agreement, one of which is the downtown area. RLA and HUD entered into the NDP master agreement on March 19, 1969. A funding agreement was then entered into by RLA and HUD for the First Action Year.

42 U.S.C. §1451(e) provides:

> "No loan or grant contract may be entered into by the Secretary unless he determines

> that (1) the workable program for community improvement presented by the locality . . . is of sufficient scope and content to furnish a basis for evaluation of the need for the urban renewal project; and (2) such project is in accord with the workable program."

The Workable Program which was certified by the City Council provides that it is a requirement of the community that citizens are to be given an opportunity to participate and further states that one of the groups established for citizen participation in downtown urban renewal is Downtown Progress. At the time the Workable Program was re-certified, BASYAP did not exist as an association.

Plaintiffs contend, however, that Downtown Progress has interests other than those of plaintiffs in that plaintiffs represent small businesses while Downtown Progress represents large enterprises and that none of the properties to be acquired are owned by Downtown Progress members. However, the areas scheduled for acquisition under the Second Year Action Plan have within them a property owned and operated by a large, national retailer and at least two properties owned by Downtown Progress members.

The exhibits submitted by the defendants clearly establish that Downtown Progress began, in December 1969, an intensive campaign to inform all persons likely to be affected of proposed second year NDP actions around the two downtown Metro stations. The campaign consisted of personal contacts, telephone calls, mailings and many meetings hosted by Downtown Progress for RLA spokesmen and interested owners and tenants. Those who did not

attend the meetings were identified and subsequently contacted by RLA representatives. More than 180 persons, approximately one-third of those invited, attended the meetings. Interested owners were urged to join in private assemblies appropriate for development in accord with the plan. Plaintiffs contend that they had no "obligation" to attend these meetings and they are correct in that contention. The Workable Program, however, recognizes Downtown Progress as a citizen participation vehicle which, in the light of this record, afforded plaintiffs and other affected persons ample opportunity to participate in the process which has led to the Second Year Action Plan. Persons are not, however, obligated to participate.

At least since November 25, 1969 RLA and persons represented by plaintiffs have exchanged correspondence and held meetings concerning the downtown redevelopment.

Notification that NCPC proposals were likely to deal with areas around the downtown Metro stations was sent to downtown businessmen and on April 2, 1970 many persons, some of whom are represented by plaintiffs, spoke at an open session of NCPC. On that date, NCPC adopted the modifications to the downtown plan by resolution to designate for acquisition all or part of the four squares lying in the downtown retail core referred to above. Those four squares lie in the areas adjacent to two major downtown subway stations presently under construction in connection with the Metro system.

The principal purpose of the Second Action Year was stated by Chairman Edwards of NCPC:

> "The urban renewal process would be used to acquire sites in subway impact areas around two key stations in order to stimulate private investment, to realize the

maximum economic potential of these locations and to encourage the use of the rapid transit system. Areas proposed for acquisition during the Second Year NDP in Downtown contain extensive amounts of blighting environmental conditions – including inadequate loading facilities, under utilization of properties and obsolete buildings, – and sub-standard structures. They constitute parts of the Downtown core where major private land assembly and building by private developers are not occurring."

"The Metro system alone will not be sufficient to revitalize the Downtown Area, since it will also serve competitive areas both in and outside of the District of Columbia. These other areas enjoy good investment climates. Metro alone cannot overcome the problems of land assembly and poor environment. Selective renewal will provide an opportunity for private developers to participate in the revitalization of the Downtown Core on sites that are of an adequate size to achieve satisfactory economic feasibility. In addition, this large scale of development will improve the physical appearance of the subway impact areas and the overall environment in the Downtown Area as a whole."

"The renewal of these new gateways to the Downtown Area will serve as the major economic catalyst for revitalizing the entire Downtown Area and stimulating private investment. To insure this prospect, renewal

> actions should be coordinated directly with the construction of the subway system to Downtown."

The Washington Metropolitan Transit Authority is acquiring and demolishing properties in Downtown including nine properties in the four Downtown action areas and three properties at the northeast corner of 7th and G Streets, N.W., directly across from one of the action areas. Metro construction is proceeding independently of any urban renewal activities.

On May 25, 1970 plaintiffs met with HUD representatives and requested a hearing and access to records. The requested hearing was denied because HUD does not have procedures for such. The requests for records were denied because they lacked specificity.

The public hearings held by the City Council on June 1, 2 and 8, 1970 were attended by many persons, including several represented by plaintiffs and the transcripts of those hearings reveal a full exchange of views on the proposed modifications to the downtown plan. On June 25, 1970 the City Council adopted a resolution approving those modifications, which states in part:

> "It is desirable and in the public interest that . . . [RLA] continue to carry out the program . . . the acquisition for clearance and redevelopment of the areas designated [the action areas] is necessary; the objectives of the renewal program cannot be achieved by rehabilitation . . ."

Also on June 25, 1970, the City Council adopted a Supplementary Resolution, which RLA accepted, providing

that no site occupant shall be displaced from any of the properties to be acquired until the Council received, by January 1, 1971, proposals for the direction which redevelopment of downtown would take, and approve a course of action for such redevelopment.

On June 29, 1970, RLA filed an application with HUD for financial assistance for the Second Action Year Plan. RLA submitted evidence in support of its application, including evidence in support of favorable findings with respect to determinations required to be made by HUD prior to execution of a funding agreement.

With respect to the rehabilitation determination by HUD, which plaintiffs single out for special attention, the record shows that the necessary finding was made prior to execution of the contract. A project inspection had been conducted. On October 30, 1970 the Regional Counsel in the Philadelphia Office expressed the opinion that additional evidence was required before a rehabilitation finding could be made. The Associate General Counsel of HUD disagreed with Regional Counsel's opinion, stating that execution of the contract need not be deferred. The contract was executed on November 18, 1970. By oversight, the Form-6341 reflecting the finding that had previously been made was not fully endorsed until December 18, 1970, although it had been executed on behalf of the Chief of the Project Planning and Engineering Branch of the Regional Office on July 14, 1970. That contract constitutes the funding agreement with RLA for the Second Action Year.

On January 26 and 28, 1971, the City Council's Housing and Urban Development Committee held public hearings on alternative design concepts for downtown urban renewal which had been presented for Committee

consideration by RLA. Among the persons who presented written or oral statements in opposition to the proposed alternatives were Philip J. Brown, Mrs. Amalya Reifsneider, George Frain and George C. Karafas, who, respectively, are the president, vice-president, secretary and treasurer of BASYAP.

By memorandum dated April 6, 1971, the Chairman of the Housing and Urban Development Committee presented the Committee's Report on Downtown Urban Renewal to the City Council. The Committee's Report concerned, *inter alia*, property disposition proposals and the release from the restrictions relating to demolition and relocation imposed pursuant to the resolution approving the Second Year Action Plan for the Downtown Urban Renewal Area.

At its meeting of April 6, 1971, the City Council approved the Report on Downtown Urban Renewal.

Based on this record, both statutory and Workable Program citizen participation requirements were complied with.

Where Congress has committed an area of discretion calling for expert judgment to an administrative agency, judicial review of that expertise is necessarily limited. *Securities and Exchange Commission v. New England Electric System*, 390 U.S. 207, 88 S. Ct. 916 (1968). The function of the Court is not to conduct a hearing *de novo* on the evidence before the administrative agencies but to determine whether or not there was a rational basis for the action taken. *Udall v. Washington, Virginia and Maryland Coach Co., Inc.*, 388 F.2d. 765 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969). This court must view the various administrative actions in that light.

After oral argument by counsel and careful examination of the motions for summary judgment and supporting

points and authorities, statements of genuine issues, affidavits and depositions and exhibits filed in this case, the Court finds that:

1. Affected site occupants were kept informed and given an opportunity to influence and participate in the planning process and that persons presently represented by plaintiffs have been active and frequent participants in the downtown program.

2. There is no statutory provision for a HUD formal or informal hearing of the nature sought by plaintiffs. The responsibility for assuring citizen participation is vested in the local agencies. *Cf. McKinney v. Washington*, ____ U.S.App.D.C. ____ , No. 23,890, November 25, 1970.

3. The Downtown Plan contains a site and use plan which meets the requirement of local law. 5 D.C. Code §705(b)(2), and the mere fact that no sale or lease of property has been authorized for purposes of the Second Action Year Plan does not mean that the Plan itself does not contain a site and use plan.

4. The City Council had, prior to its adoption of the modifications to the Downtown Plan, substantial evidence upon which to determine that the Second Action Year Plan conformed to the Downtown Plan, that Plan objectives could not have been achieved by rehabilitation, and that the existing structures in the four proposed action areas were of such deficiency as would justify acquisition.

5. The HUD approval of the application for financial assistance and execution of the funding agreement for the Second Action Year Plan was substantially and rationally supported, and was not arbitrary, capricious or unreasonable, and in executing that funding agreement, HUD was certifying that all required findings had been made.

This memorandum opinion shall constitute findings of fact and conclusions of law.

Accordingly, it is this 30th day of July, 1971.

ORDERED, that the motions for summary judgment of defendants Romney, RLA, NCPC, City Council and D.C. Government be and they are hereby granted, and it is further

ORDERED, that plaintiffs' motion for summary judgment be and it hereby is denied and that the claims in plaintiffs' complaint against those defendants are dismissed.

/s/ John Lewis Smith, Jr.
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-381

BUSINESSMEN AFFECTED BY THE SECOND YEAR ACTION PLAN (BASYAP), PETITIONERS

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL AND DISTRICT OF COLUMBIA RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The court of appeals did not issue an opinion; its judgment is set forth at Pet. App. A3–A4. The district court's unreported memorandum opinion and order is set forth at Pet. App. A4–A16.

JURISDICTION

The judgment of the court of appeals (Pet. App. A3–A4) was entered on April 28, 1972. A timely petition for rehearing and suggestion for rehearing *en banc* were denied on June 7, 1972 (Pet. App. A1–A2). The petition for a writ of certiorari was filed on

September 5, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' challenge to the urban renewal program for the District of Columbia was properly rejected upon review of the entire administrative record.

STATUTES INVOLVED

Section 307 of the Housing Act of 1964, 78 Stat. 787, 42 U.S.C. 1460(c), and Section 302(a)(1) of the Housing and Urban Development Acts of 1965, 79 Stat. 474, 42 U.S.C. 1451(e), amended the basic urban renewal statute of 1949 and are set forth at Pet. 4–5.

STATEMENT

Petitioners commenced this action in June 1970 to enjoin part of the downtown District of Columbia urban renewal program. Petitioners are owners and business operators of some of the properties designated for acquisition for urban renewal. Named as defendants were the Secretary of the Department of Housing and Urban Development (HUD), the District of Columbia Redevelopment Land Agency (RLA), the National Capital Planning Commission (NCPC), the District of Columbia Government and City Council, and the National Capital Downtown Committee, Inc. (Downtown Progress), a nonprofit corporation of downtown land and building owners. Petitioners alleged that there was a lack of adequate citizen participation in adopting the renewal program and that HUD had improperly refused to afford petitioners a hearing and had failed to make a timely finding that

the objectives of the program could not be achieved by rehabilitation.

After an evidentiary hearing, the district court denied petitioners' motion for a preliminary injunction. The court of appeals affirmed. 442 F. 2d 883.

Subsequently, after extensive discovery and upon a review of the entire administrative record, the district court granted respondents' motions for summary judgment (Pet. App. A4–A16). The court found that Downtown Progress, one of the organizations designated in the "workable program" as a vehicle for citizen participation, conducted an "intensive campaign" to involve all interested persons in the development of the renewal plans and that it in fact "afforded plaintiffs and other affected persons ample opportunity to participate in the process * * *" (Pet. App. A9–A10). The court also found that HUD had no statutory authority to conduct the hearings sought by petitioners and that HUD's execution of the funding agreement for the redevelopment program was in effect a certification that it had determined rehabilitation would not achieve the program's objectives (Pet. App. A12–A13, A15–A16). The court of appeals affirmed without opinion (Pet. App. A3–A4).

ARGUMENT

The decision below is correct, and the petition presents no issue warranting review by this Court.[1]

[1] Petitioners' suggestion (Pet. 9)—that "this is the first time where this course of action (taking from one set of commercial property owners and turning it over to other private interests for commercial development) has ever been attempted under the guise of an urban renewal program and for this reason it

1. There is no substance to petitioners' charge (Pet. 11–13) that HUD unlawfully refused them a hearing and unlawfully refused them access to its files. There is no statutory provision for a formal or informal hearing and no HUD machinery for an adjudicatory proceeding. Petitioners nevertheless met with HUD officials on one occasion and presented their views both before and after the commencement of this action, the City Council's approval of the urban renewal plan, and HUD's allocation order for funding (Fed. Exs. J–1 through J–14; Fed. Ex. 22–HUD and enclosure). Petitioners' direct request to HUD for access to "data and records" and for a "hearing" at which they could rebut the findings of RLA concerning the condition of their buildings was made after this suit had been filed, and was properly denied. The district court thereafter permitted broad discovery, and respondents produced voluminous data and records.

In *Shannon* v. *United States Department of Housing & Urban Development* 436 F. 2d 809 (C.A. 3), relied on by petitioners, the court held "only that the agency's judgment [as to site or type selection] must be an informed one" based upon "the relevant racial and socio-economic information necessary for compliance with

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has nation-wide implications"—is answered by *Berman* v. *Parker*, 348 U.S. 26, 33–34, where this Court rejected a similar contention:

> Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. * * *

its duties under the 1964 and 1968 Civil Rights Acts" (436 F. 2d at 821, 822). That decision does not stand for the broad proposition advanced by petitioners that HUD must offer persons affected by an urban renewal project the opportunity to submit rebuttal data at a formal hearing prior to approval of the project for funding (Pet. 13).[2] The Secretary of HUD is under no statutory obligation here to duplicate the efforts of local agencies in determining the condition of the buildings in the project area. His determination that the "workable program" is adequately designed "to eliminate * * * slums and urban blight, to encourage needed urban rehabilitation, [or] to provide for the redevelopment of blighted, deteriorated, or slum areas" (42 U.S.C. 1451(c)), may properly rest in part upon the local agency's evaluation of the affected buildings, if in his view that evaluation is reliable.

2. Petitioners contend that the Secretary of HUD failed to determine prior to entering the funding agreement that the objectives of the program could not be achieved through rehabilitation (Pet. 17–19). Although the funding contract was executed on November 18, 1970, and full endorsement of the HUD form embodying the rehabilitation finding was not completed until December 18, 1970, the record supports the district court's finding that the necessary

[2] Indeed, the court emphasized that there was no requirement that affected residents be heard, so long as the necessary information is obtained. Thus, a report from the applicant on racial concentration might be an acceptable means of fulfilling the agency's obligation. 436 F. 2d at 821.

determination here had in fact been made prior to the agreement, notwithstanding that the formalities of endorsement were delayed by "oversight" (Pet. App. A13).[3]

3. Under 42 U.S.C. 1451(e), the Secretary of HUD must determine that the project to be funded "is in accord with the [workable] program." The program here required "'clear evidence'" of opportunities for citizen participation and for "'clear and direct access to decision making * * *.'" Petitioners contend here, as in the courts below, that they did not have an adequate opportunity to participate in the decision making process (Pet. 15–17). The district court found, however, that petitioners had a full opportunity to participate through meetings and hearings organized by Downtown Progress, letters to and meetings with RLA representatives, presentations at open sessions of NCPC, and testimony before the City Council (Pet. App. A9–A12, A13–A14, A15). These findings are fully supported by the record and should not be disturbed.

[3] The Moore plan referred to by petitioners (Pet. 11, 18–19) was developed after the city's renewal program had been adopted and has not been submitted by the city to HUD for consideration pursuant to 42 U.S.C. 1451(c) and (e) which make clear, in the words of the latter provision, that the "program for community improvement [is to be] presented by the locality * * *."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
KENT FREZELL,
Assistant Attorney General.
RAYMOND N. ZAGONE,
Attorney.

C. FRANCIS MURPHY,
Corporation Counsel,
District of Columbia.
RICHARD W. BARTON,
Assistant Corporation Counsel,
District of Columbia.

OCTOBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-381

BUSINESSMEN AFFECTED SEVERELY BY YEARLY ACTION PLANS, INC. (BASYAP, INC.), *et al.*,

Petitioners,

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

REPLY TO BRIEF FOR THE FEDERAL AND DISTRICT OF COLUMBIA RESPONDENTS IN OPPOSITION

Respondents' brief in opposition to the petition for certiorari asserts that this case presents no substantial question for review by this Court.

But in their attempt to justify this assertion, the Respondents have themselves indicated the substantial nature of the questions presented for review. The proposal which the

Petitioners have challenged in this case is the condemnation by the government of a substantial area in the downtown district of Washington, D.C.; the destruction of all existing buildings in that area; a destruction the necessary result of which will be the elimination of 130 small individually owned business entities.[1] For some members of the plaintiff association, the proposed plan will mean the destruction of businesses to which they have devoted their entire lives. In other instances, the businesses which the Respondents propose to destroy are the product of the work of two or more generations in the same family.

I

THE FAILURE OF THE RESPONDENTS TO PERMIT THE PETITIONERS TO SUBMIT EVIDENCE THAT THE AREA IN QUESTION CAN BE REHABILITATED WAS AN ABUSE OF DISCRETION.

The Respondents assert in their brief:

> There is no 'substance to petitioners' charge (Pet. 11-13) that HUD unlawfully refused them a hearing and unlawfully refused them access to its files. There is no statutory provision for a formal or informal hearing and no HUD machinery for an adjudicatory proceeding. (Respondent Br. 4)

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[1] The forced removal of established businesses pursuant to a plan for urban renewal has almost invariably, according to past experience, meant the total destruction of those businesses. Secretary Romney, one of the Respondents in this case, has, by his own public testimony, supported this conclusion.

In this attempt to demonstrate that there is no substantial question, the Respondents have made it absolutely clear that this case involves a substantial question of due process.

> . . . where governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. (*Greene v. McElroy*, 360 U.S. 496 (1959)

The Constitution requires such an adjudicatory proceeding where the outcome of a proceeding turns on an accurate resolution of specific factual disputes, See, *e.g., Goldberg v. Kelly*, 397 U.S. 254, 266, 267 (1969); *Thorpe v. Housing Authority*, 393 U.S. 268, 281, 282 (1969); *Avent v. Newark Housing Authority*, 393 U.S. 870.

In this case, the reasonableness of the urban renewal plan depends upon the resolution of specific fact issues. Included in those specific fact issues are

(1) Is the area which the Respondents propose to destroy a blighted or slum area?

(2) Can the purposes of urban redevelopment be accomplished by rehabilitation?

Without the specific resolution of those fact issues against the Petitioners, the Secretary of Housing and Urban Development was not authorized to fund the Downtown Renewal Project. The record in this case shows that the Secretary did not himself resolve these fact issues, but, on the contrary relied upon the determinations which had been made by the local authorities, to wit Respondent DCRLA. Passing over the question whether the Secretary had a legal

right to rely upon the determinations of others as to these vital issues (See, *e.g., Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402; *D.C. Federation of Civic Associations v. Volpe,* D.C. Cir., No. 24,838), Respondents' contention that the Secretary could make such factual determinations without allowing citizens adversely affected by the decision to present contradicting evidence and without considering that opposing information, raises a substantial issue as to the Constitutional permissibility of his action. Cf, *Shannon v. United States Department of Housing and Urban Development,* 436 F.2d 809 (C.A. 3, 1970). Yet, Respondents admit (Brief, p. 6, fn 3) that the Secretary did not in fact consider the substantial and authoritative evidence presented by Arthur Cotton Moore which demonstrated that the area was not a substandard one and that all legitimate aims of urban renewal could be accomplished, at less cost, by rehabilitation programs. They seek to excuse this by asserting that the Moore Plan was not presented to the Secretary by the local authorities.[2] who, of course, were asserting a position diametrically opposed to that of the Petitioners.

Thus, Respondents, in attempting to maintain the contention that the case presents no substantial issue have, in fact, conclusively demonstrated that the case raises a serious and substantial question as to the constitutionality, under the due process clause, of the authority claimed by the Secretary.

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[2] Petitioners attempted to timely present the Moore Plan to the Secretary via Respondents NCPC, City Council, and the Secretary himself as early as August 1971 and through September 1972, the City Council refusing to even consider the Moore Plan as an alternative. See Petition, fn. 18.

II

THERE IS A SUBSTANTIAL QUESTION OF THE VALIDITY OF THE SECRETARY'S DETERMINATION, IF HE MADE SUCH A DETERMINATION, THAT THE PURPOSES OF URBAN RENEWAL COULD NOT BE ACHIEVED WITHOUT THE DEMOLITION OF THE BUILDINGS AND THE RESULTANT DESTRUCTION OF PETITIONERS' BUSINESSES.

Respondents represent to the Court that there is no substantial issue because the Secretary has determined that the program is adequately designed to eliminate slums and urban blight. (Respondents' Brief, p. 5) The argument proceeds upon the assumption that the Secretary may accept the determination of the local authorities as to this fact question, and argue, on the basis of *Berman v. Parker,* 348 U.S. 26, that the means of accomplishing the project are for Congress alone to determine.

This argument, of course, raises a substantial question as to the extent to which Congress has made a determination as to the means for carrying out this project, and whether the Secretary has disregarded that Congressional finding. The statute provides:

> . . . no contract shall be entered into for any loan or capital grant under this subchapter for any project which provides for demolition and removal of buildings and improvements unless the Secretary determines that the objectives of the urban renewal plan could not be achieved through rehabilitation of the project area. . . . [42 U.S.C. 1460 (c) 10 (A)]

The brief of the Respondents nowhere asserts that the Secretary made any such finding, and he did not make

any such finding of fact. The Secretary's conclusion that the purposes of the urban renewal plan can be accomplished through the demolition of these buildings is a finding far different from that required by the statute; to wit, that those purposes cannot be accomplished without the destruction of the buildings. In point of fact, the ends and purposes of the urban renewal project can be accomplished, through the Arthur Cotton Moore Plan, which envisages the utilization of air rights. The Secretary has refused to consider the Arthur Cotton Moore Plan, although urged to do so by other governmental agencies, including the National Capital Planning Commission, the Council on Environmental Quality, and the Department of Interior as late as August 1972. (See, Final Environmental Impact Statement for District of Columbia Neighborhood Development Plan Modification via Disposition Controls to the Downtown Urban Renewal Area, Project No. D.C. A-1-1, Vol. III, Commentaries, 2, 7, 5, Exhibit to Government Motion to Dissolve Injunction, *BASYAP v. DCRLA*, D.C. D.C. 99-72) In fact, the Secretary actually found that all of the purposes of that plan could be achieved through the Arthur Cotton Moore Plan. (*Op. cit.*, Vol. I, Matrix I, following p. III-24)

Whether the Secretary's determination rejecting the Moore Plan constitutes arbitrary executive action in plain contravention of the Congressional direction presents, we submit, a substantial question which this Court ought to consider fully.

The approved urban renewal plan, stripped of its ornamentation, is for the seizure under public authority of the property of one group of private persons who are classical small-businessmen in a purely commercial area, in order to give it to other private persons, who represent big business

to develop the area commercially. The Respondents assert that they are empowered to do this under the authority of *Berman v. Parker*, 348 U.S. 26.[3] The twenty years which have followed this decision have been an unrelieved disaster for the owners of private property in affected areas, as the Secretary himself has testified.

The viability of any decision of this Court, as is true, of any other court, is the result of that decision. The test of the law, as Mr. Justice Holmes remarked, is not logic but experience. In the light of that experience, *Berman v. Parker*, 348 U.S. 26, should be re-examined for the purpose of determining whether the taking of private property for the benefit of other private persons is constitutionally permissible. Such a re-examination presents an especially substantial question where, as here, the respondents attempt to utilize the asserted authority of Congress as a justification for proceeding in direct defiance of the Congressional determination that private property and private business is not to be destroyed unless it is absolutely necessary to accomplish the public purpose of rehabilitating housing areas of cities.

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[3] See fn 1 of Respondents' brief. Their reliance on *Berman v. Parker* is patently misplaced and clarification is in order. The area in *Berman* was predominantly residential, only 5.1% of the land being "First Commercial" and 6.7% being "Second Commercial" for a total commercial land usage of 11.8% (See case below 117 F. Supp. 705, at 709) and the urban renewal plan therein called for total residential usage with parks, playgrounds, whereas the Plan herein calls for demolishing all structures (which are all used commercially) in a purely commercial area and turning it over to other private persons to develop commercially.

III

WHETHER THE REQUIREMENT THAT THE PETITIONERS PRESENT THEIR VIEWS THROUGH A HOSTILE PRIVATE ORGANIZATION IS "FAIR PLAY," AND THEREFORE CONSTITUTIONALLY PERMISSIBLE, PRESENTS A SUBSTANTIAL ISSUE WHICH THIS COURT SHOULD CONSIDER.

The petition for certiorari and the brief in opposition demonstrate that the parties are in agreement that community participation in the planning stages is a pre-requisite for a valid urban renewal plan.

However, the respondents assert that the petitioners had full opportunity to participate through meetings and hearings organized by Downtown Progress. (Respondent's Brief, p. 6).

Again, in attempting to indicate that there are no substantial questions, the respondents have themselves demonstrated just how substantial those questions really are.

Downtown Progress is not a governmental organization. On the contrary, it is a private organization, some of whose members may very well be included in the list of the beneficiaries of the seizure of private property in the case for redevelopment by others. Downtown Progress is an organization of large business interests, whereas Petitioners represent and are members of the small business community. The potential conflict is obvious, their respective interests could not be more diametrically opposed.

However, Respondents blandly assert that the opportunity for Petitioners to attend the public meetings sponsored by these conflicting interests is a sufficient compliance with the admitted requirement that Petitioners be afforded an opportunity to participate in the decision making process.

The very statement of that position, if it does not itself refute Respondents' contention, certainly demonstrates that there is a substantial question whether Petitioners have in fact been afforded a fair opportunity to present their refutation of the facts which have been assembled and presented by Downtown Progress. Whether a hearing is required does not alter the fact that a fair process must afford opportunity for the presentation of conflicting views from those whose substantial interests are to be adversely affected by being destroyed. Requiring those conflicting views to be presented through the conduit of interests diametrically opposed to them is not the "fair play" which the due process clause requires.

CONCLUSION

The respondents' own brief demonstrates the extent and substantiality of the questions presented by this case. The petition for certiorari should be granted.

Respectfully submitted,

NICHOLAS A ADDAMS
1707 N Street, N.W.
Washington, D.C.
Attorney for Petitioners

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DEC 8 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-381

BUSINESSMEN AFFECTED SEVERELY BY YEARLY ACTION PLANS, INC. (BASYAP, INC.), *et al.*,

Petitioners,

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

PETITION FOR REHEARING ON DENIAL OF PETITION FOR CERTIORARI

NICHOLAS A ADDAMS
1707 "N" Street, N.W.
Washington, D.C. 20036
Attorney for Petitioners

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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PETITION FOR REHEARING ON DENIAL OF PETITION FOR CERTIORARI

Under Supreme Court Rule 58(2) Petitioners request a rehearing on the denial of their Petition for Certiorari on November 13, 1972.

The grounds for this petition are:

1. After the filing of the Petition for Certiorari on September 5, 1972, the President's Counsel on Environment of Quality (CEQ) and the Department of Interior strongly urged further study of petitioners' alternative plan to the urban renewal plan herein.

2. In view of the November 13, 1972 date of this Court's order denying the Petition for Certiorari, Petitioners respectfully suggests that the Court did not have the opportunity to evaluate Petitioners' timely-filed Reply to the Respondents' Opposition, said Reply setting forth the merits of Petitioners' alternative plan.

I. RECOGNITION BY OTHER GOVERNMENT AGENCIES OF THE MERITS OF PETITIONERS ALTERNATIVE PLAN CORROBORATES PETITIONERS' CONTENTION THAT RESPONDENT SECRETARY OF HUD ABUSED HIS DISCRETION IN FAILING TO AFFORD PETITIONERS A DUE PROCESS OPPORTUNITY TO DEMONSTRATE THAT THE ALTERNATIVE PLAN MEETS THE OBJECTIVES OF THE URBAN RENEWAL PLAN HEREIN

Petitioners filed a civil action in the U.S. District Court for the District of Columbia in January 1972 challenging the urban renewal project herein[1] for failure to comply with Section 102 of the National Environmental Policy Act of 1969.[2]

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[1] *BASYAP v. DCRLA, et al.*, Dt. Ct. D.C., No. 99-72.

[2] 42 USC 4332(2).

Petitioners won an initial preliminary injunction pending the filing of the statutorily-required environment impact statement by Respondent Secretary of HUD. Respondent Secretary ultimately filed an impact statement and served a copy on counsel[3] herein on September 25, 1972, three weeks after the Petition for Certiorari was filed. Included as exhibits to said impact statement, were letters from the President's Council on Environmental Quality (CEQ) and the U.S. Department of Interior, which strongly suggest that Respondent Secretary never considered Petitioner's alternative plan.[4]

CEQ's letter (Appendix A-1, hereto) strongly critized Respondents' failure to adequately consider the Arthur Colton Moore Plan and noted the unconvincing analysis of the project herein.

The Department of Interior's letter (Appendix A-2, hereto) points out numerous inadequacies of HUD's consideration of Petitioners alternative plan and the numerous faults of the present project itself, and ends with a caustic rebuke of HUD for it's failure to consider the social impacts on the area and the fate of the 130 businesses in the project area.[5]

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[3] Also counsel for BASYAP, *supra* 1.

[4] The Court will recall the Petition for Certiorari contended Petitioners were not afforded an opportunity to rebut the present project and to present the merits of their alternative plan, the Arthur Colton Moore plan, dealing with an air-rights concept of rehabitating the present structures and building other structures above them.

[5] The Court will recall the Petition for Certiorari calling attention to the likelihood of the destruction of the small-business community in the project area.

Just reported in the Washington Post on December 5, 1972, (see Appendix A-4), the U.S. General Accounting Office strongly criticized Respondent HUD for it's failure to prepare adequate environmental impact statements before financing projects significantly affecting the environment.[6]

The CEQ and Interiors letters are clearly supportive of Petitioners' earlier contention that Respondent HUD never considered the Arthur Cotton Moore Plan and never afforded Petitioners a constitutionally adequate due process opportunity to challenge the project herein and to present reasonable alternatives.

Petitioners realize the foregoing government letters are not evidences bearing directly on the merits of the Petition for Certiorari. However, insofar as they reflect on the unconstitutional actions of the Respondents herein in denying Petitioners a constitutionally adequate due process opportunity to rebut the government's facts before the government takes their property and destroys their businesses and livelihoods[7] – the letters are significant to the extent that this Court should not blind itself to the irreparable injury the government is unconstitutionally foisting on Petitioners.

This Court cannot in good conscience refuse to recognize the merits of Petitioners' contention raised in the Petition for Certiorari because of political, personal or other reasons. This Court must recognize the social havoc which will result from failure to grant certiorari, to wit,

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[6] The District Court in *BASYAP v. DCRLA et al.*, D.C.D.C. 99-72 found that the project will significantly affect the environment.

[7] *Greene v. McElroy*, 360 US 474, 476 (1959).

the destruction and death knell of small businesses throughout the country – the very foundation of this country. Respondent HUD, and local agencies funded with federal money, will consider this Court's refusal to grant certiorari as a license to declare purely commercial areas – comprised mainly of small-businesses – as blighted and deteriorated under the guise of an urban renewal area without giving the small-businessmen the opportunity to challenge the factual basis of the declaration, and as a further license to transfer these areas over to a select few developers for intensive commercial development. Permitting this to occur, without resolving the constitutional propriety of the process, will turn the clock back 20 years in Washington and across the land to the darkest days of arbitrary administrative oppression.

II. THE COURT APPEARS NOT TO HAVE HAD THE OPPORTUNITY TO CONSIDER PETITIONERS' TIMELY-FILED REPLY BEFORE DENIAL OF CERTIORARI

Petitioners filed and served by hand their Petition for Certiorari on September 5, 1972. Respondents' Opposition was mailed to counsel and received on October 26, 1972. Petitioners filed a timely Reply to the Opposition on Thursday, November 9, 1972. Since this Court's letter of denial was dated November 13, 1972,[8] a Monday, the ordinary logistics of assembling the members of the Court for decisions, subsequent paper work, and ultimate typing would suggest that the decision to deny certiorari was not made on November 13, 1972 but on a day in the previous week, leading to the further logical conclusion

[8] Counsel was advised of such denial by a telephone call from a newspaper wire service approximately 10:00 a.m. on November 13, 1972.

that this Court made it's decision on the day of filing or some previous day to the filing of Petitioners' Reply and that the Court did not consider the Reply.

The Reply was relevant to the Court's decision as it provided pertinent rebuttal to the government's brief and conclusionary 2 page argument of their Opposition devoted to the merits of the Petition for Certiorari. The Reply also amplified the Arthur Colton Moore Plan, which was ever so cursorily treated in footnote 3 of the Opposition and corrected Respondents misstatement of *Berman v. Parker*, 348 U.S. 26.

Before making the decision on the merits of the Petition for Certiorari – the denial of which will likely adversely affect small businesses throughout the country – the Court should have had the benefit of Petitioner's Reply and considered it along with the Petition.

WHEREFORE, Petitioner prays that the Petition for rehearing be granted.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that this Petition is restricted to the grounds initially set forth.

NICHOLAS A ADDAMS, ESQ.
1707 "N" Street, N.W.
Washington, D. C. 20036
785-1250
ATTORNEY FOR PETITIONERS

APPENDIX

EXECUTIVE OFFICE OF THE PRESIDENT
Council On Environmental Quality
722 Jackson Place, N. W.
Washington, D. C. 20006

July 11, 1972

Dear Mr. Jackson:

The Council staff has reviewed the draft environmental impact statement submitted by your Department on the proposed Downtown Urban Renewal Area in Washington, D.C. In our judgment, the analysis leading to the proposed action, when compared to alternatives available, is not convincing. In particular, further attention should be given to the so-called "air rights development" proposal designed by architect Arthur Cotton Moore and supported by a number of other groups and individuals.

In this regard, Council staff have met in recent weeks with HUD officials on an informal basis to outline our suggestions. We understand that further investigations of alternative actions are now underway. We endorse this undertaking and urge you to use whatever means you consider appropriate to elicit additional information for use in the preparation of the final statement.

Sincerely,

/s/ Timothy Atkeson
Timothy Atkeson
General Counsel

Mr. Samuel C. Jackson
Assistant Secretary for Community
Planning and Management
Department of Housing and Urban Development
Washington, D. C. 20410

cc: Mr. James Miller, HUD
Mr. Robert Duckworth, HUD Area Office

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

August 7, 1972

Mr. Samuel C. Jackson
Assistant Secretary for Community
Planning and Development
Department of Housing and Urban
Development
Washington, D. C. 20410

Dear Mr. Jackson:

This is in response to your letter of May 1972 requesting our comments on the Department of Housing and Urban Development's draft environmental impact statement, dated May 8, 1972, for the District of Columbia Neighborhood Development Program Plan Modification via Disposition Controls to the Downtown Urban Renewal Area.

The proposed action implements a small portion of the Downtown Urban Renewal Area and is interrelated with development of the subway system. Accordingly, it is sometimes difficult for the reviewer of the draft statement to distinguish clearly the environmental impacts of the project from those of the more comprehensive Downtown Urban Renewal Project and of the subway system now under construction. Contributing to this confusion are the graphics in the draft statement which frequently portray the Downtown Urban Renewal Area without any indication of the proposed project site locations. Also, the graphics have a low degree of legibility.

The subject draft environmental statement makes no reference to historic or archeological resources. Section 106 of the National Historic Preservation Act of 1966 (80 Stat. 915) requires that the head of any Federal agency having direct or indirect jurisdiction over a federally assisted undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking, take

into account its effects of any district, site, building, structure, or object that is included in the National Register of Historic Places. Accordingly, the draft statement should show evidence of reference to the National Register and consultation with the State Liaison Officer for Historic Preservation concerning properties in the project area which may be under consideration for nomination to the National Register. The Deputy Mayor serves as the State Liaison Officer for Historic Preservation in the District of Columbia. Also, we suggest that the draft environmental statement indicate what steps would be taken to mitigate any adverse effects upon archeological resources should such resources be encountered during project development.

We believe that the social impacts of the proposed action merit further consideration and analysis. Little attention is given to the effect of the proposed project on the 50 households, the 130 business establishments, and the 1,000 or so persons now employed by these establishments which would be displaced by the proposed project.

Because the objectives of the proposed actions have economic overtones, we are surprised at the paucity of hard data concerning probable economic effects. We believe that the draft environmental statement should contain an analysis of the primary and secondary economic impacts of the proposed projects on the community.

We hope these comments will be useful to you in preparation of the final environmental statement.

Sincerely yours,

(sgd) W. W. Lyons
Secretary of the Interior

Deputy Assistant

A14 Tuesday, Dec. 5, 1972 THE WASHINGTON POST

GAO Scores Environment Impact Data

United Press International

The General Accounting Office (GAO) criticized six federal agencies yesterday for preparing inadequate environmental impact statements before financing projects significantly affecting the environment.

Rep. John D. Dingell (D-Mich.) said the environment is degraded and the public is shortchanged by the failure of the agencies to comply with the precepts of the 1969 Environmental Policy Act.

The agencies criticized by the GAO, Congress' auditing agency, were the Soil Conservation Service, Corps of Engineers, Reclamation Bureau, Federal Highway Administration, Forest Service and Department of Housing and Urban Development.

"They resist efforts to disclose fully all adverse environmental effects of their projects," Dingell said. "They are fearful that if they do so, the public would insist that many projects be substantially altered or abandoned."